Supreme Court, U. S.
FILED
OCT 2 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-555

DONALD S. WARREN,

Petitioner,

v.

C. J. KUIPER, STATE ENGINEER,
COLORADO GROUND WATER COMMISSION
and W-Y GROUND WATER MANAGEMENT DISTRICT

Repondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COLORADO SUPREME COURT

MARVIN B. WOOLF
Attorney for Petitioner
2040 14th Street, Suite 300
Boulder, Colorado 80302

September 26, 1978

TABLE OF CONTENTS

	Page
OPINIONS BELOW	2
JURISDICTION	2
QUESTION PRESENTED	2
STATUTE INVOLVED	2
STATEMENT	4
REASONS FOR GRANTING THIS WRIT	6
CONCLUSION	8
APPENDIX A Opinion of the Colorado Supreme Court	1a
APPENDIX B Opinion of the District Court of Yuma County	1b

TABLE OF CASES

Fellhauer v. People, 447 P.2d 986 (Colo. 1968)	7
Yick Wo v. Hopkins, 118 U.S. 356 (1885)	7

STATUTES

39-90-101 et seq., Colorado Revised Statutes (1973)	2
28 U.S.C. 1257 (3)	2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. _____

DONALD S. WARREN,

Petitioner,

v.

C. J. KUIPER, STATE ENGINEER,
COLORADO GROUND WATER COMMISSION
and W-Y GROUND WATER MANAGEMENT DISTRICT,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COLORADO SUPREME COURT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States.

Donald S. Warren, the Petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the Colorado Supreme Court entered in the above-entitled case on June 12, 1978.

OPINIONS BELOW

The opinion of the Supreme Court of Colorado is reported at 580 P.2d 32 (Colo. 1978), and is printed in Appendix A hereto. The opinion of the District Court in and for Yuma County, Colorado, is unreported and is printed in Appendix B hereto.

JURISDICTION

The judgment of Colorado Supreme Court was entered on June 12, 1978. A timely petition for rehearing was denied on July 3, 1978. The jurisdiction of the Court is invoked under 28 U.S.C. 1257 (3).

QUESTION PRESENTED

Whether the Colorado Ground Water Commission administered the Colorado Ground Water Management Act, as amended, in a manner which violated petitioner's rights under the equal protection clause of the fourteenth amendment to the United States Constitution.

STATUTE INVOLVED

1. The Colorado Ground Water Management Act, Section 37-90-101 et seq., Colorado Revised Statutes (1973), provides in pertinent part:

> 37-90-107. Application for use of ground water.
> (1) Any person desiring to appropriate ground water for a beneficial use in a designated ground water basin shall make application to the commission in a form to be prescribed by the commission. The applicant shall specify the particular designated ground water basin or subdivision thereof from which water is proposed to

be appropriated, the beneficial use to which it is proposed to apply such water, the location of the proposed well, the name of the owner of the land on which such well will be located, the estimated average annual amount of water applied for in acre-feet, the estimated maximum pumping rate in gallons per minute, and if the proposed use is irrigation, the description of the land to be irrigated and the name of the owner thereof, together with such other reasonable information as the commission may designate on the form prescribed. The amount of water applied for shall only be utilized on the land designated on the application. The place of use shall not be changed without first obtaining authorization from the ground water commission.

37-90-108. Final permit - evidence of beneficial use - limitations.--

(1) After having received a conditional permit to appropriate designated ground water, the applicant shall proceed with due diligence to construct the well or other works necessary to apply the water to a beneficial use. The applicant shall, upon completion of the well, furnish the commission information as to the maximum sustained pumping rate in gallons per minute, measured by such procedure as prescribed by the commission, such rate to be certified by a licensed water well drilling contractor or pump installation contractor, by three disinterested persons, or as authorized by the commission. The applicant shall also furnish the commission with such evidence in the form prescribed by the commission as will demonstrate that the water has been put to beneficial use.

(2) If after due investigation the commission

finds that the water has been put to beneficial use and that the other terms of the conditional permit have been complied with, the commission shall order the state engineer to issue a final permit to use designated ground water at the rate determined by the procedure prescribed in subsection (1) of this section and containing such limitations and conditions as the commission shall deem necessary to prevent waste and for the protection of other appropriators.

(3) A conditional permit to appropriate designated ground water shall expire and be of no force or effect at the expiration of one year from the date of its issuance, unless the conditions set forth under subsection (1) of this section have been complied with within that time, or unless extended by the commission for a period certain upon good cause shown.

2. Section I of the fourteenth amendment to the United States Constitution, U. S. Const. amend. XIV, I, provides:

SECTION I. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT

Petitioner owns 160 acres of farmland in Yuma County,

Colorado. In order for that land to be put to its most productive use, it must be irrigated.

Beginning in 1970, and acting under a valid conditional permit issued by the Colorado Ground Water Commission, Petitioner began exploration for an adequate supply of water. At considerable expense, Petitioner drilled three test wells, purchased pumping equipment, installed underground pipe and otherwise prepared his land for irrigation. By August 9, 1973, Petitioner had completed construction of a well and irrigation system, and the well itself had been pumped for test purposes. However, the system was not operated because the growing wheat crop did not need supplemental water, and to have applied water would have constituted waste under the circumstances. Thus, when the time stated on the conditional permit expired on August 10, 1973, Petitioner was unable to demonstrate that water from the well had been put to beneficial use as required by C.R.S. 37-90-108 (1973). Further, Petitioner did not apply in a timely fashion for an extension of time.

In 1975, Petitioner used water from the well for the first time and irrigated a crop of beets. Petitioner then submitted the required statement of beneficial use in support of his application. However, the Colorado Ground Water Commission rejected his statement of beneficial use as untimely and later issued a cease and desist order against Petitioner. An administrative hearing was held at which the order was upheld, and later an action for injunction was brought against Petitioner in the District Court for Yuma County. In that action Petitioner introduced evidence that he had applied the water to beneficial use, and further that the requirements of C.R.S. 37-90-108 (1973) had been selectively enforced against him in violation of his rights under the fourteenth amendment of the United States Constitution in that numerous others had acted as Warren had,

but had not been issued cease and desist orders, but rather, with the full knowledge and consent of the Commission continued to pump irrigation water. The injunction was granted and Petitioner filed a timely notice of appeal from that decision.

In his brief to the Colorado Supreme Court dated April 7, 1977, Petitioner specifically alleged error on the part of the District Court in holding that discriminatory enforcement of the statute was not violative of his federal constitutional rights. Petitioner again specifically raised this issued in a reply brief to the Colorado Supreme Court dated August 24, 1977.

The Colorado Supreme Court affirmed the judgment of the District Court in an opinion dated June 12, 1978. Without responding specifically to Petitioner's legal arguments concerning his federal consitituional rights, the Court found that "...the trial Court's ruling was supported by the evidence and was factually and legally correct." Appendix A, page 7a.

On June 22, 1978, Petitioner filed a timely Petition for Rehearing asking the Court to reconsider, inter alia, the correctness of its conclusion concerning his rights under the federal constitution. On July 3, 1978, the Court denied the petition.

On August 18, 1978, Petitioner requested the Clerk of the Colorado Supreme Court to prepare a transcript of the entire record in this action for transmission to the Clerk of the United States Supreme Court.

REASONS FOR GRANTING THIS WRIT

The holding of the Colorado Supreme Court, that the

Colorado Ground Water Commission may enforce the provisions of the Colorado Ground Water Management Act in a discriminatory manner violates Petitioner's fourteenth amendment rights and sanctions a pattern of selective and arbitrary administration of that Act.

Petitioner introduced considerable evidence showing that the Colorado Ground Water Commission has permitted other similarly situated water users to continue their use of water even though they, too, have failed to comply with the procedural requirements of the Colorado Ground Management Water Act. This evidence is summarized in Petitioner's brief of August 7, 1977, to the Colorado Supreme Court. However, Petitioner's good faith claim of discriminatory enforcement was not given serious or favorable consideration by either the District Court for Yuma County or the Colorado Supreme Court, despite the fact that such discrimination is clearly violative of the fourteenth amendment to the United States Constitution. Yick Wo v. Hopkins, 118 U. S. 356 (1885).

In addition, the holding below ignores the rulings of the Colorado Supreme Court in other similar cases. In Fellhauer v. People, 447 P.2d 986 (Colo. 1968), the Court found unconstitutional a similar selective pattern of enforcement of the 1965 Act. In that case a Division Engineer randomly shut down 39 of 1,600 to 1,900 wells which had been adversely affecting a water source. Though the Court found he acted conscientiously and in good faith, nevertheless "in his attempted enforcement of the 1965 act, he proceeded discriminatorily in violation of the equal protection clause of the fourteenth amendment of the United States Constitution and of due process clause in Article II, Section 25 of the Colorado Constitution." id. at 993.

As a result, if not reversed, the decision below may have important and far-reaching consequences. In light of the increasing importance of water resources to the economy of Colorado, the holding below in effect vests the Colorado Ground Water Commission with a power to influence the development and viability of the State's economy in a manner not contemplated by the State Legislature and not subject to constitutional limitations.

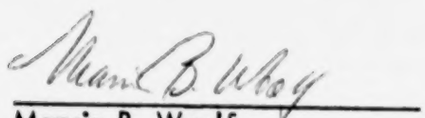
Colorado has always been an Appropriation State in regard to its surface rights, and the Colorado Doctrine is recognized as an outstanding and fair administration of the division of water between competing users. However, with the adoption of the Colorado Ground Management Act, a hybrid of water law ensued, adopting a part of the Colorado Doctrine, but primarily adopting the permit system of such neighboring states as New Mexico and Wyoming.

If Colorado, in enforcing this hybrid permit system seeks to ignore the necessity of complying with solid constitutional law as followed by its sister states, any potential Interstate compacts governing underground water may never reach fulfillment because Colorado will attempt to enforce its new doctrine: "The distribution of underground water is accomplished by a rule of men, not a rule of law."

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a Writ of Certiorari should be granted.

Respectfully submitted,



Marvin B. Woolf
Attorney for Petitioner
2040 14th Street, Suite 300
Boulder, Colorado 80303

IN THE SUPREME COURT OF COLORADO

No. 27460

C. J. KUIPER, STATE ENGINEER, COLORADO GROUND WATER COMMISSION, and W-Y GROUND WATER MANAGEMENT DISTRICT,

Plaintiffs-Appellees,

v.

DONALD S. WARREN,

Defendant-Appellant.

Appeal From the District Court of Yuma County

Honorable Francis L. Shallenberger, Judge

MR. JUSTICE ERICKSON delivered the Opinion of the Court.

On November 2, 1970, the Colorado Ground Water Commission (commission) issued Sylvian J. Warren a conditional permit to construct a well and appropriate water in the Northern High Plains Designated Ground Water Basin in Yuma County. Clearly printed on the permit was the statement that the permit was "VALID FOR ONE (1) YEAR AFTER DATE ISSUED UNLESS EXTENDED FOR GOOD CAUSE SHOWN TO THE ISSUING AGENCY." Three extensions were subsequently granted which afforded the permit holder until August 10, 1973, to

perfect his appropriation.

Donald S. Warren, the appellant and Sylvian's successor in interest, filed a statement of beneficial use with the commission on December 11, 1974, claiming that water had been placed to beneficial use on September 10, 1973. The commission refused to accept the statement on the ground that the conditional permit had expired August 10, 1973, and was of no effect. Warren was ordered to abandon the well.

Warren requested and was granted a hearing on April 4, 1975. Testimony at the hearing established that the well had been completed on August 9, 1973, but that water had not been applied to beneficial use until 1975. Warren testified that water had not been placed to beneficial use prior to 1975 for several reasons. First, both 1973 and 1974 were "wet years" and no water was needed. Secondly, the land near the well had been planted in crops which did not require irrigation. And, finally, application of water under such conditions would have constituted waste. The commission, nonetheless, held that the permit had expired prior to application of water to beneficial use and ordered that Warren discontinue his diversions.

Warren refused to comply with the order, and consequently, the state engineer, the commission, and the W-Y Ground Water Management District filed a complaint in district court for injunctive relief. Trial to the court resulted in a judgment permanently enjoining Warren from further use of the well. The court entered an order that the well be plugged and abandoned in accordance with the prior order. We affirm.

Three questions are addressed on appeal: First, did the trial court err by holding that an appropriator with a conditional permit to appropriate designated ground water

must place the water to beneficial use within the time prescribed by statute, regardless of whether due diligence has been shown? Secondly, do statutory time provisions in the designated ground water context violate constitutional guarantees to divert unappropriated water? And, finally, did the trial court err in refusing to hold that the commission has administered the Colorado Ground Water Management Act (Act), section 37-90-101, et seq., C.R.S.[1] 1973, in a discriminatory manner?

I.

Section 37-90-108(3), C.R.S. 1973,[2] provides that conditional permits expire one year after the date of issuance unless the statutory requirements for a final permit have been satisfied or unless extended by the commission for a period certain upon good cause shown. The statute reflects a legislative determination that most designated ground water appropriations can be completed within one year, but also permits the commission to grant extensions upon good cause shown to avoid unjust results. The commission has effected the legislative intent by adopting the following policy guidelines:

> "5. Extension of Permits. A request for extension of the conditional permit must be submitted to the office of the Division of Water Resources on or before the date of expiration of said permit with good cause

---

1 Now section 37-90-101, et seq., C.R.S. 1973 (1977 Supp.).

2 Now section 37-90-108(3), C.R.S. 1973 (1977 Supp.).

indicated or no such extension will be granted by the Commission.

"6. Unpumped Wells (Beneficial Use). When a conditional permit has been granted and the well has been drilled and completed, the staff may, for good cause shown, grant an extension of one year from the expiration date of the permit to allow the applicant to apply the water to a beneficial use. Additional extensions can be granted only by the Commission upon good cause shown and the taking into consideration of the merits of each individual case."

The appellant contends that the concept of due diligence, as developed in Colorado surface water law, is applicable to appropriations under the Colorado Ground Water Management Act. Section 37-90-101, et seq., C.R.S. 1973. Warren claims that he is entitled to a water right since he has proceeded with due diligence to complete his appropriation, regardless of his failure to comply with the provisions of the Act.

The trial court rejected Warren's contention and held that the statutory time provisions were reasonable and must be observed:

> "There are reasonable grounds for the adoption of specific time limits in relation to the management of designated ground waters as distinguished from the 'due diligence' requirements applicable to surface appropriations. As a practical matter, it is apparent that the construction, installation and operation of an

> irrigation well is in no way comparable, for example, to the planning, construction and operation of a transmountain diversion project.
>
> "Under the Statutes and the Rules of the Commission provision is made for extensions of the permit upon good cause shown. This provides adequate protection to a permit holder confronted with exigent circumstances."

We agree with the trial court's conclusion.

The Colorado Ground Water Management Act established a reasonable procedure for the appropriation of designated ground water. The Act created a permit system for the allocation and use of this scarce resource. North Kiowa-Bijou Management District v. Ground Water Commission, 180 Colo. 313, 505 P.2d 377 (1973). The statutory procedure was intended to result in the issuance of a final permit to those appropriators who complete their appropriations in accordance with the statutory provisions. Peterson v. Ground Water Commission, ____ Colo. ____, ____ P.2d ____ (Supreme Court No. 27746, announced June 5, 1978).

While the Act establishes a time parameter for the completion of an appropriation, the Act and the commission guidelines afford appropriators the opportunity to obtain extensions upon a showing of good cause. The good cause shown provision, while not identical to the doctrine of due diligence, affords appropriators many of the same protections. Both the statutory extension procedure and the doctrine of due diligence afford appropriators, who are reasonably proceeding to complete

appropriations under conditional rights, protection against loss of their rights. Designated ground water appropriators must construct their wells, place water to beneficial use, and comply with the statutory filing and time provisions or lose their right to divert. The trial court properly held that the appellant, who had sought and been granted previous extensions, had failed to seek an additional extension, failed to place water to beneficial use within the life of the permit, and permitted his conditional permit to expire.

II.

The appellant's second allegation is that the constitutional right to make an appropriation will be impermissibly denied unless the doctrine of due diligence is held to apply in the designated ground water context. We disagree.

The Act's time provisions, including the portions which authorize extensions upon good cause shown, do not prohibit nor impermissibly limit the constitutional right to appropriate the unappropriated waters of our natural streams. Colo. Const., Art. XVI, Secs. 5 and 6. The statute merely regulates the manner of effecting an appropriation in the designated ground water context and does not prohibit such appropriation. See Larimer County Reservoir Company v. People, 8 Colo. 614, 9 P. 794 (1885). The permit procedure contained in the Act is reasonably designed to achieve the economic development of our scarce designated ground water resources. See Thompson v. Colorado Ground Water Commission, ___ Colo. ___, 575 P.2d 372 (1978); Fundingsland v. Colorado Ground Water Commission, 171 Colo. 487, 468 P.2d 835 (1970). Warren's contention is, therefore, without merit.

III.

The final issue addressed on appeal is whether the commission has enforced the provisions of the Act in an arbitrary and discriminatory fashion so as to deprive Warren of the equal protection of the laws. U. S. Const., Amend. XIV. Warren asserts that other appropriators have been permitted to divert water even though they failed to comply with the provisions of the Act.

The trial court rejected the appellant's contentions:

> "The Defendant called eleven witnesses in support of the allegation of discriminatory enforcement of the one year rule within which to apply the water to a beneficial use. The Court does not attempt to judge those other individual cases on their merits. Suffice it to say that in practically all of the instances referred to the water had, in fact, been put to a beneficial use within the valid life of the permits involved. In the cases where this appears not to have been the situation there may have been extenuating circumstances justifying the action of the commission or State Engineer. In any event, if in these cases, the Commission or the State Engineer was in error that would not justify a sanction of the error, nor does it establish a discriminatory practice."

A review of the record causes us to conclude that the trial court's ruling was supported by the evidence and was factually and legally correct.

The remaining allegations of error lack merit and do not require discussion.

Accordingly, the judgment is affirmed.

IN THE DISTRICT COURT IN AND FOR THE
COUNTY OF YUMA AND STATE OF COLORADO
CIVIL ACTION NO. 5633

C. J. KUIPER, STATE ENGINEER,
COLORADO GROUND WATER COMMISSION
AND W-Y GROUND WATER MANAGEMENT
DISTRICT,
Plaintiffs,

vs.

DONALD S. WARREN,
Defendant.

FINDING OF FACT,
CONCLUSIONS OF LAW
AND DECREE

This matter came on regularly for hearing on March 23 and 24, 1976, the Plaintiffs being represented by Ben L. Wright, Jr., Special Assistant Attorney General, and the Defendant by Marvin Woolf, Attorney at Law.

Plaintiff's Complaint sets forth grounds upon which they sought to obtain an injunction prohibiting further use of an irrigation well and that Defendant be ordered to plug and abandon the well. In the main, their grounds are that the Defendant failed to place the well to a beneficial use before the expiration of the conditional permit.

Defendant filed an Answer and Counterclaim which denies that the permit expired and alleged the well was

timely drilled and put to use. The "Counterclaim" alleges the well was completed and water has been used. The growing seasons of 1973 and 1974 were wet years and there was no need for the waters from the well so that its usage would have constituted waste prohibited by law. The waters were applied to a growing crop in 1975. A second "Counterclaim" alleges a denial of equal protection under the Constitution of Colorado and the United States of America in that others in the District were permitted to use their pumps without evidence the water was put to beneficial use within one year of the issuance of the permit and with evidence the water was first put to beneficial usage more than one year after issuance of the permit.

THE COURT, being now fully advised in the premises, DOTH MAKE THE FOLLOWING FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECREE AS follows:

FINDING OF FACT

Plaintiffs have established all of the material facts alleged in the Complaint. Defendant has failed to establish a legal defense. Without limiting this general finding, it is specifically found that the following facts are established by the evidence:

Conditional Well Permit No. 15251F was issued to Defendant's predecessor in interest, his brother, S. J. Warren. It was issued November 2, 1970 for construction of an irrigation well in the SW 1/4 SE 1/4, Section 16, T. 3 N, R. 47 W. of the 6th P.M., which is located within the established Northern High Plains Designated Ground Water Basin and W-Y Water Management District and is subject to the Colorado Ground Water Management Act, being 1973 CRS 37-90-101 et sec. Defendant, for himself or for his brother, did timely obtain extensions for the drilling of the well until August 10, 1972, and an

extension for placing the water to a beneficial use until August 10, 1973. On August 14, 1972, there was filed a well completion and pump installation report showing the well was completed but no pump installed and the well not tested. Previously, an extension had been granted for the drilling, equipping and putting water to beneficial use until February 2, 1972. A second drilling extension for thirty days after a relocation of the permit was approved until August 10, 1972. On August 8, an extension of one year was requested for the placing of the water to a beneficial use, which extension was granted until August 10, 1973.

In the forepart of August, 1973 the well was tested. Thereafter the Defendant had an electrical line to the well energized and set a panel. The pump bowls and motor had been ordered and were installed in 1974. Underground pipe was installed in the spring of 1975 and a crop of sugar beets was irrigated, the first irrigation being in May of that year.

The Defendant called eleven witnesses in support of the allegation of discriminatory enforcement of the one year rule within which to apply the water to a beneficial use. The Court does not attempt to judge these other individual cases on their merits. Suffice it to say that in practically all of the instances referred to the water had, in fact, been put to a beneficial use within the valid life of the permits involved. In the cases where this appears not to have been the situation there may have been extenuating circumstances justifying the action of the Commission or the State Engineer. In any event, if in these cases, the Commission or the State Engineer was in error that would not justify a sanction of the error, nor does it establish a discriminatory practice.

The Defendant did not take timely appeal from the action of the State Engineer in issuing his order, within

the time required by Statute, and the same became a valid and final order. The Defendant did not place the water to a beneficial use within the time required or within the life of the permit. The term "beneficial use" as used in the statutes implies something more than a pumping test.

The Defendant is the owner of several other wells, has on various occasions taken appeals from decisions of the Commission, has in the past consulted with staff members about problems, was aware of the necessity for and the procedures involved in the application and granting of extensions of time.

There are reasonable grounds for the adoption of specific time limits in relation to the management of designated ground waters as distinguished from the "due diligence" requirements applicable to surface appropriations. As a practical matter, it is apparent that the construction, installation and operation of an irrigation well is in no way comparable, for example, to the planning, construction and operation of a transmountain diversion project.

Under the Statutes and the Rules of the Commission provision is made for extensions of the permit upon good cause shown. This provides adequate protection to a permit holder confronted with exigent circumstances.

The Plaintiffs have established adequate necessity for the issuance of the injunction and unless the same issues the Defendant will continue to pump water from this well.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Defendant Donald S. Warren, his agents, servants, employees, and lessees, be and they hereby

are permanently enjoined from pumping water from the well owned by the Defendant in SE 1/4 SE 1/4 of Section 16, T 3 N, R. 47 W of the 6th P.M., County of Yuma, State of Colorado, and that within sixty days he shall plug and abandon said well in accordance with instructions given by the State Engineer.

The Clerk is hereby ordered and directed to enter judgment in accordance herewith. Defendant shall have thirty days in which to file a Motion for New Trial if he is so advised.

Done this 2nd day of April, A. D., 1976.

_____

District Judge